IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

DAVID NEIL MAC MURRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 18792

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S CLOSING BRIEF

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INDEX

Table of Cases

REGULATION

U. S. CONSTITUTION

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POINT I

Special Appellate Procedures

Appellee concludes that Mac Murray was not entitled to an inquiry and hearing upon the denial of his claim to conscientious objection status.

Appellee argues that the opportunities for vindication are available only to registrants within the statutory definition, namely, "by reason of religious training and belief," and that a single word "No" put him at once, and

for all time, outside the law when he answered "No" to the flat question: Do you believe in a Supreme Being?

We argue that the question "Does Mac Murray's evidence place him within the statutory definition" is a question for the administrative appellate determination envisaged by Congress, namely, one where the claim and evidence is sifted and tested by the special appellate procedures.

Appellee's argument assumes that the initial presentation of the registrant's views placed him unmistakably outside the definition. We will (A) demur and then (B) dispute its verity.

A.

Assuming Mac Murray initially placed himself outside the statutory definition does this mean that he is barred from (1) a change of views or (2) a clarification of his presentation? Absolutely not. The regulations themselves are clear on this.

> "§ 1625.1 Classification Not Permanent—(a) No classification is permanent.
>
> "(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupation, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

"(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants."

The purpose of the special appellate procedures for registrants professing conscientious objectors to war was to provide an impartial test of the *bona fides* of the claim, based on a thorough and expert investigation of the claimant. This we argued in our Opening Brief, pages 17-

The law specifies that the special appellate procedures are to help in the determination of "The character and good faith of the objections."

The character of Mac Murray's objections have never been given an administrative appellate determination as provided by Congress; only by the *ipse dixit* of the Attorney General, whose fiat blocked the appellate procedure.

Appellee argues as if the inquiry of the special appellate procedures related only to "sincerity", citing *Bouziden* v. *United States,* 251 F.2d 728 (10th Cir., 1958); *Selby* v. *United States,* 250 F.2d 666 (9th Cir., 1957); *Bradshaw* v. *United States,* 242 F.2d 180 (10th Cir., 1957).

1. *Bouziden.* This case is inapropos for Bouziden was given the special appellate procedures and his argument in the judicial appeal was that the FBI resume furnished him was unfair.

2. *Selby.* The special appellate procedures were given Selby.

3. *Bradshaw.* He too received all the statute provided for him.

Appellee's next step is to argue that Mac Murray was not prejudiced by the deprivation "since his own statements would necessitate the denial of his claim to conscientious objector status. *United States* v. *De Lime,* 223 F.2d 96 (3rd Cir. 1955)."

Except for one item in the file (the X in the NO box on the Supreme Being question) appellee mentions no factual matter to support this conclusion. We will argue this X did not end the matter. First, let us consider the case cited by appellee to compare the factual situation.

De Lime, supra, differs materially from Mac Murray's case on the facts and therefore should not be considered governing authority. The opinion on page 97 shows that De Lime (1) struck out the words "religious training and" in the questionnaire, before the word belief to change the sentence to read "By reason of belief I am opposed . . ." and (2) he crossed out the same words in another place and (3) he explicitly set forth "my belief is philosophical rather than religious," and (4) he made certain it was understood his beliefs were a personal moral code by saying "no person whom I know holds the same or similar beliefs" and (5) he wrote the board a month afterwards that he had no further explanation to make of his views and, when he attended a hearing he (6) reaffirmed that his views were philosophic and not on religious grounds,

although he did claim the wording of the several questionnaires was a literary trap [98].

Nevertheless, De Lime was given a significant part of the special appellate procedures, ones which accorded him a chance to discuss his beliefs with a Hearing Officer of the Department of Justice and to have the benefit of a resume of the FBI reports.

Appellee next argues "Not all claims to conscientious objector status, but only those based on statutory grounds, are subject to inquiry and hearing. The leading case on this point is *Clark* v. *United States,* 236 F.2d 13 (9th Cir., 1956)." The authority of *Clark* on this contention is considerably weaker than appellee's claim for it because of four circumstances:

> *Clark* had been given *all* the special appellate procedures on an earlier appeal: appellant had a full and complete investigation, etc., on his first conscientious objector claim. . . . [20]
>
> Next, the court's statement that Clark did not have a claim *within* the statute *was obiter* because the court had already decided he *had* had the complete special appellate procedures, and the court concluded: [a] registrant is not entitled to repetitious determinations, ..." [21]
>
> Next, Clark was denied the desired classification because he was found to be agnostic in thought. [21]
>
> Finally, and this observation applies also to our next constitutional point, it is obvious that none of the courts that decided Clark, De Lime and George had the benefit of the subsequent Torcaso and Schempp decisions of the Supreme Court. This we

will deal with, at more length, under Point Two, below.

As in the *Bouziden, Selby* and *Bradshaw* cases, *supra,* (all of which turned on other matters, it should be noted), when we read that Clark too had once received the special appellate procedures we must conclude their postures before the courts were unappealing and that there is reason to consider that Clark was not prejudiced. Mac Murray, on the contrary, was obviously prejudiced.

The chief issues to be decided by the special appellate procedures are the truthfulness of Mac Murray and the character and good faith of his claim, not just his sincerity as appellee states. 50 U.S.C. App., § 456, explicitly says it is for determination of "[t]he character and good faith of the objections of the person concerned. . . ." The record squarely presents these issues:

1. Was he truthful on July 1, 1958, when he stated the following:

> "By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a special form for conscientious objector (SSS Form 150) which I am to complete and return to the local board for its consideration."

If it is true that he is a conscientious objector by reason of religious training and belief, as he states above, it follows he should have been so classified. The local board obviously didn't think he was. (Actually, it didn't understand him, then or later.) But there remained the matter

of an administrative appeal. As we argue the one he received was a crippled one, less than the law provided for.

The sole purpose of the special appellate procedures is to aid in the determination of the truthfulness of such protestations.

2. Next, was he truthful on June 21, 1959, when he stated:

> "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces."

We concede that a registrant, after making such a claim can contradict it so clearly that he puts himself outside the definition of the statute. Did Mac Murray do this. Where? Only one item in the file of over 100 pages [Ex. A] is ever alluded to by appellee. This item, the No, was clarified later [Ex. 72-75]. The clarification showed the problem was solely one of semantics. But, even if he hadn't sent in the evidence on pages 72-75 of the Exhibit should this one item outweigh all his other showing? Would the Third Circuit have so decided the De Lime case if he hadn't had six other strikes against him? We doubt it.

B.

Mac Murray's views at all times were within the statutory definition.

First, consider his initial statements:

In response to question six which asked appellant to describe the actions and behavior in his life which in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions, appellant stated "I have a great regard for the value of human life, as well as a love of all peoples and races. I am a very creative person being a poet, musician, and writer. I am a very sensitive person completely intolerant of violent and destructive measures." [Ex. 17]

This is a statement of religious belief. It is not a statement of theology.

It is not a statement acceptable to persons who stress humility (cf. *Annett* v. *United States,* 10 Cir., 1953, 205 F.2d 692) nor was its maker acceptable to persons who stress tolerance and good manners (see his statement to the local board, quoted by appellee, re stupid asses) but it is the statement of a recognized and prevalent religious type: a zealot, radical in statement, intolerant, replete with feeling and sentiment.

At age 20 a young man could well balk at the Yes or No check mark indicated for the blunt Supreme Being question. He could easily believe (and what Mac Murray wrote three years later shows this distinction) that an anthropomorphic being was meant. The court's attention is invited to the fact that at certain places in the questionnaries warning signs are posted. For example, in the Classification Questionnaire: Series VII.—CONSCIENTIOUS OBJECTION TO PARTICIPATION IN WAR IN ANY FORM there are two warning statements "DO NOT

SIGN THIS SERIES UNTIL YOU HAVE READ THE FOLLOWING CAREFULLY," at the beginning and "DO NOT SIGN UNLESS YOU CLAIM EXEMPTION AS A CONSCIENTIOUS OBJECTOR" at the end. [Ex. 8].

The question which appellee believes is crucial and determinative: "Do you believe in a Supreme Being" Yes ☐ No ☐ has only a choice of two words. True, the registrant is informed that he may add sheets to the four page questionnaire but there is no warning or the slightest intimation that the authorities will consider that a No to this *one* question ends their consideration of the entire subject and requires a rejection by them without the congressionally provided safeguard being employed.

As we showed in our Opening Brief [34-] the term Supreme Being is synonymous with God. Webster's International:

> "*God.* The Supreme Being; the eternal and infinite spirit; Creator and Sovereign of the universe"
>
> "*Supreme Being.* The eternal and infinite Spirit; God, as the creator and end of man"

We know this is true but Mac Murray didn't in 1959, or even in 1962.

In 1962 he wrote:

. . . . .

> "What I question and resent concerning the Supreme Being clause is the utilization of such an ambiguous word as Supreme Being in this clause with its fundamentalist overtone. I do not believe in any Supreme Being with hair, arms, flesh or in any like-

> ness of man whatsoever. I do believe in a more universal interpretation of Supreme Being as did Albert Einstein, that of a high state of order and even disorder within the physical universe governed by laws which are presently above my ability or that of any man to completely control or completely understand. *If this is a Supreme Being then I believe in the existence of a Supreme Being.*" [Ex. 73]
>
> . . . . .
>
> "My objection to the word Supreme Being is thus based on the lack of a proper interpretation of the word and my failing to have understood the meaning of the word." [Exs. 73-74]

It is a common misconception, especially among young people learning to think for themselves, that the expression Supreme Being means an anthropomorphic being. Note that this was one of De Lime's problems. He stated to the Hearing Officer: "[h]ad I known the full meaning of the wording of the question; I would not have stated that I had no Supreme Being as a basis for my belief and I would not have avoided the word 'religious' had I read it earlier. I had no counsel for advice." [98]

De Lime's claim, as we pointed out suffered from many infirmities for his file shows he had equivocated in many instances and thus contaminated his claim; MacMurray fell into the same semantic trap but his claim does not suffer from the other infirmities that doomed De Lime's, or any others. Mac Murray has been consistent throughout: straightforward, to the point of objectionable righteousness.

Three years after his initial statement [see Exs. 72-75] when he saw a clarification of his religious emotion and sentiment might make his beliefs understandable, he, for the first time explains and shows that to him the Supreme Being question is semantical only.

Although he asked the board to substitute the later statements of belief for the initial one there is no inconsistency between them. The latter is only a clarification of the religious belief clearly expressed in the former although it was not labelled as such by him.

Appellee's argument doesn't point out one sentence or even phrase from Mac Murray's showing as a basis for the conclusory assumption Mac Murray "was clearly outside the statutory definition."

Mac Murray's evidence should be examined to see if two constructions are possible. If so he certainly should have had the benefit of the special appellate procedures to have the truth determined. Of course, if it is clear that he brought himself within the statutory definition (as we have argued) then it is clear he was denied procedural due process.

On the matter of affirmatively expressing belief in a "Supreme Being" he says:

> "A specific and exact definition of Supreme Being, God and even religion are almost impossible because of the great ambiguity of these words and since their meanings vary greatly between many different peoples and cultures, nature, the universe and the laws that govern each of them can all be God and thus, a Supreme Being since they are considered synonymous." [Ex. 72]

Mac Murray then goes on to give a historical analysis showing that, during the course of millennia

> "To the Egyptians and even some people today the sun was a Supreme Being. The moon, rivers, mountains, valleys, forests and stars—all of these have been worshipped as Supreme Being in the past and can be taken for such even today. Anything can be taken as being or symbolically representing a Supreme Being." [72]

In our case we have an expression and clarification of views [Exs. 72-75] presented to the Selective Service System *more than three years* after his earlier presentation [Exs. 16-19, Form 150]. Can it be said that views and expression of views at age 20 are forever binding? True, modification, etc., is subject to some suspicion but sincerity, truthfulness and integrity are what the special appellate procedures are designed to test, that is to compile evidence by FBI investigation, clarify it by a hearing officer hearing, and analyze and summarize it by a department of justice specialist (with two rebuttal opportunities afforded) for the final, informed and advised judgment of an Appeal Board. An appeal without the above on an unaugmented record, is unfair to all concerned and is not what Congress intended when it wrote the law.

It is our view that the expressions of Mac Murray's views [Exs. 72-75] brought him within the statutory definition and within this court's anticipatory decision of *Berman* v. *United States,* 156 F.2d 377, 380 (9th Cir.), cert. denied, 329 U.S. 795 (1946)

> "It is our opinion that the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." [380]

It is our view also, that the Selective System and the Department of Justice should never assume that when a young man is confronted with the Yes or No of the question: Do you believe in a Supreme Being that a No ends the matter. What the registrant really means should be investigated. This, surely was the intent of Congress. This really is the Congressionally assigned function and duty of the Department of Justice.

We believe this is so because the question is not really a Yes or No question.

POINT II

Constitutionality

Appellee's argument that it is permissible for Congress to distinguish the kinds of conscientious objectors on the basis of religion, philosophy, etc., is avowedly based on the principle stated in *George* v. *United States,* 9 Cir., 1952, 196 F.2d 445, namely, that what Congress can do it can do arbitrarily. The fallacy of this is that what Congress is constitutionally forbidden to do it may not do at all. Nor can Congress or appellee rely on the war power clause of the constitution as a side entrance to circum-

vent the First and the Fifth Amendments. *George, supra,* should be revisited.

Appellee argues "The statutory exemption from military service for conscientious objectors is not a constitutional right, but is given by the grace of Congress. *Richter* v. *United States,* 181 F.2d 591, 593 (9th Cir. 1950)." It does not follow that Congress can therefore grant a privilege, or deny it when the basis is violative of the First Amendment protections and thus we dispute the next statement of appellee: "Consequently, Congress can eliminate the exemption or condition it in any manner, perhaps even unreasonably and arbitrarily. *George* v. *United States, supra; Clark* v. *United States, supra.*"

We contend that the Fifth Amendment bars improper exercise of the war power.

The Supreme Court as early as *Ex parte Milligan,* 4 Wall. 2, 120-121, held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The Milligan case involved the release on habeas corpus of a civilian who had been sentenced to death upon a military trial during the Civil War in the State of Indiana, where federal court trial was available. Compare *Cummins* v. *Missouri,* 4 Wall. 277 at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless this Court itself has recognized that such presumption will be of no avail where the presidential war order is clearly shown to be arbitrary and repugnant to the Fed-

eral Constitution. See *Highland* v. *Russell Car & Plow Co.*, 279 U.S. 253, at pages 261 and 262.

Appellee's argument closes by posing this dilemma: "If Congress could not constitutionally limit the conscientious objector exemption on the basis of certain beliefs, it would be forced to exempt any person who did not choose to enter military service, or to abolish the exemption entirely and compel military service from everyone even those religiously opposed to it. The Constitution does not require Congress to make such a choice."

We do not agree with this logic. The First Amendment does not prohibit the exclusion of "certain beliefs" but only the exclusion of all but certain religious beliefs. Some beliefs are religious and some are not. The First Amendment relates only to the former. Next, it doesn't follow at all that "it would be forced to exempt any person who did not choose to enter military service." The next claim "or to abolish the exemption entirely" doesn't follow either. The only statement in point is the last clause "even those religiously opposed to it." Nothing else. The only belief we are concerned with is this latter: "religiously opposed." The other alternatives don't apply at all.

In *Engel* v. *Vitale*, 82 S. Ct. 1261 (1962), Mr. Justice Black, speaking for the court:

> "[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite

as a part of a religious program carried on by government." [1264]

We argue this means the government cannot set up a religious orthodoxy for draft deferment.

Mr. Justice Black also said in *Engle* v. *Vitale,* more to our particular point:

> "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.[15]" [1267]

Since religion is personal it is individual and the proscription of a personal code, by the Act, is therefore a violation of the First Amendment.

The Supreme Court's opinion contains another guide for consideration of our problem:

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [1267]

These principles have been reaffirmed even more recently in *Abington School District* v. *Schempp,* 1963, 374 U.S. 204:

> "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and

concisely stated in the words of the First Amendment." [226]

This principle of absolute protection for religious belief has been affirmed countless times by our courts, often when restating the laws that *acts* contrary to our laws are punishable despite the religious sincerity of the defendant. See a recent example in *U.S.A.* v. *Willard,* D.C. Ohio, 1962, 211 F. Supp. 643, where the court said:

> "Under the First Amendment of our Constitution, freedom to believe in and to adhere to one's chosen form of religion cannot be restricted by law, but freedom to act in accordance with one's religious beliefs necessarily 'remains subject to regulation for the protection of society.' Cantwell v. State of Connecticut, 310 U.S. 296, 303, 304, 60 S. Ct. 900, 903, 84 L. Ed." [654]

Also, see one of the cases cited by appellee: *United States* v. *Mohammed,* 7 Cir., 1961, 288 F.2d 236:

> "Freedom to believe and adopt one's chosen form of religion is an absolute right, but freedom of action in following one's concept of religion is 'subject to regulation for the protection of society.' " [244]

There can be no quarrel with this view of the First Amendment. Here, we are not concerned with an act, but with a belief. Without piling citations upon citations we believe we can ask the court to conclude that the limiting, indeed the proscription of personal religious *belief* in the draft law is contrary to the First Amendment.

It would appear that appellee adheres to a point of view completely at variance with the meaning of the

establishment-of-religion clause which the Supreme Court explicitly set forth in *Everson* v. *Board of Education* 1947, 330 U.S. 1, and to which it had adhered ever since. In Everson and in the subsequent cases of *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) and *Zorach* v. *Clausen,* 1952, 343 U.S. 306, there were two competing views on the meaning of the establishment clause presented to the Court: one held the establishment clause merely prohibited the setting up of a single state church and thus discriminating against all others, while the other held that it prohibited any aid to all churches and religion even on a non-discriminatory basis. Everson laid this issue to rest, and, we trust, permanently, when the latter view was adopted.

Contrary to appellee's contention (p. 12, B), the "Supreme Being" clause does constitute a "law respecting an establishment of religion", in that it defines "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." As pointed out in our Opening Brief, that definition and limitation greatly narrows the meaning of religion so as to exclude from the operation of said law continuing establishments of religion as old as history and constitutes a discrimination against them. It is therefore a "law respecting an establishment of religion," which the First Amendment expressly says Congress shall not make.

Very significantly, as quoted above, Mac Murray contends that the words "Supreme Being" are ambiguous, and follows with a statement that he believes in a Supreme

Being in the sense that Albert Einstein did. It is well known that Einstein professed the beliefs of Spinoza, most reputed as "the God-intoxicated man". It is, indeed, in the light of recent decisions of the Supreme Court, too ambiguous a phrase to qualify under the constitutional prohibition of laws "respecting an establishment of religion."

Appellee says: "The statutory exemption from military service for conscientious objectors is not a constitutional right, but is given by the grace of Congress." The issues do not require us to disagree. We do not. But the free exercise of religion is a constitutional right, and that means equality before the law of all religions, without legal discrimination in favor of one or many as against the free exercise thereof. Our objection to the definition of "religious training and belief" here in question is that by forbidden legislation it gives special privilege and immunity to those conscientious objectors deriving from religious establishments which have or profess belief in a Supreme Being, as defined in the Draft Act. The law can stand without the definition.

Finally, we argued in our Opening Brief (29, 33) the Supreme Court in *Torcasso* v. *Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 1961, made even more clear that neither State nor Federal Government can constitutionally establish a religious test for any immunity or privilege of a citizen of the United States.

Respectfully,

J. B. Tietz,
Attorney for Appellee.

November 12, 1963.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney.